Green, LindaE

From: Chris Horner <chornerlaw@aol.com>
Sent: Friday, March 13, 2015 10:47 AM
To: FOIA HQ
Subject: Request under the Freedom of Information Act -- Certain real-time correspondence of 4 EPA employees
Attachments: EELI FME Law IMs Texts FOIA.pdf

Please see the attached.

If you have any questions please do not hesitate to contact me.

Best,
Chris Horner
202.262.4458

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The Free Market Environmental Law Clinic

REQUEST UNDER THE FREEDOM OF INFORMATION ACT

March 13, 2015

National Freedom of Information Office
U.S. EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, DC 20460

RE: FOIA Request – Certain Agency Records: Real-time Messages sent or received over two periods by Gregory Pond, Matthew Klasen, Margaret Passmore and John Forren

BY ELECTRONIC MAIL: hq.foia@epa.gov

National Freedom of Information Officer,

On behalf of the Energy & Environment Legal Institute (E&E Legal) and the Free Market Environmental Law Clinic (FMELC) as co-requester and E&E Legal counsel, please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. Both groups are non-profit public policy institutes organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as transparency initiatives seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

Please provide us, within twenty working days copies of records as described from two periods totaling six months[1]:

1) all work-related real-time messages, *e.g.*, text, SMS or instant messages[2] sent or received by EPA employees Matthew Klasen and Gregory Pond of the Water Office, and Region 3's Margaret Passmore and John Forren, on either **a)** SameTime or a similar computer-based real-time messaging capability provided by EPA, or **b)** any mobile telephone or personal data assistant/personal digital assistant (PDA);

2) the relevant page(s) of the same four parties' monthly bills/invoices associated with their EPA mobile telephone/PDA account(s)/device(s) indicating their texting activity during all billing periods encompassing the six-month period covered by this request;

3) all records in EPA's possession documenting whether the same four parties had any instant message (IM) client software installed on her computer(s)/workstation(s) or other equipment;

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[1] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

[2] "Text messages" includes SMS or MMS messages, all electronic messages between two or more mobile phones or fixed or portable devices over a phone network that are not sent from an email client. In the event one or more of the cited employees' handheld devices for telephone/data use is an Apple device, this request also contemplates iMessages. In the event the or one of these handheld devices is a Blackberry device, which sends not only SMS messages, but Blackberry PINs and messages on the Blackberry Messaging service (BBM)(PINs and BBMs being slightly distinct from text messages in that they are proprietary to Blackberry--like iMessage on Apple devices--but otherwise are functionally the same as SMS), this request contemplates those messages. Regarding the latter, we note that although it is popularly assumed that no record is kept of PINs and BBMs, this is not necessarily true because the Blackberry Enterprise Server tracks those. Regardless, EPA is required to obtain, maintain and preserve all such EPA-related messages in accordance with federal record-keeping and disclosure laws.

4) all records in EPA's possession documenting that the same four parties were ever registered users of any EPA IM system(s)/network(s) or system(s)/network(s) that include or provide IM.

Responsive records will be dated (##1-2), or reflect IM capabilities (##3-4), during October 2010 through January 2011, inclusive, and March and April, 2013, inclusive.

The instant messaging aspect of this request has become an issue of national public, media and congressional attention following the disclosure that the IRS's Lois Lerner and her team were not preserving similar correspondence.[3] It also is the focus of litigation, both directly and indirectly (*e.g.*, *Competitive Enterprise Institute v. EPA* (D.D.C.13-1532 and *Competitive Enterprise Institute v. EPA* (D.D.C. 15-215), respectively).

Records obtained under the Freedom of Information Act indicate that these staff used instant or real-time messaging for work-related correspondence.

Further Relevant Information Regarding this Records Request

[3] "Lawmakers investigating the Internal Revenue Service's treatment of conservative groups released new emails Wednesday suggesting that top IRS officials communicated through an instant-messaging system that wasn't routinely archived. The revelation adds to lawmakers' concerns about the agency's handling of documents related to their inquiry into the IRS's alleged targeting of conservative tea-party groups for burdensome scrutiny as they sought tax-exempt status." John D. McKinnon, "IRS Didn't Archive Instant Messages: Emails Point to IRS Officials Using Instant Messages Messages Weren't Routinely Archived, Adding to Lawmaker Concerns About Document Handling," *Wall Street Journal*, July 9, 2014, http://online.wsj.com/articles/the-irs-loses-lerners-emails-1402700540.

These messages constitute Agency records, and are information that EPA informs employees is in fact covered by FOIA.[4] Real-time messaging correspondence must be maintained and produced as records, pursuant to the Federal Records Act and FOIA. *See*, *e.g.*, National Archives, *Frequently Asked Questions About Instant Messaging*, http://www.archives.gov/records-mgmt/initiatives/im-faq.html (Instant Messaging (IM) content can "qualify as a Federal Record," since IM "allows users" to "exchange text messages," which are "machine readable materials" and thus within the "statutory definition of records"); *Frequent Questions about E-Mail and Records*, http://www.epa.gov/records/faqs/email.htm; *Frequent Questions about Mobile and Portable Devices, and Records*, www.epa.gov/records/faqs/pda.htm; *Memo to All Staff, "Transparency at EPA,"* by Acting Administrator Bob Perciasepe, dated April 8, 2013 ("the Inspector General currently is conducting an audit of the agency's records

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[4] "**What kind of records might I have on my Mobile Device?**
Common Agency records maintained on Mobile Devices include e-mail, calendars, voice mail and any other information related to your work at EPA.
What should I do with Agency records created on my Mobile Device?
Records created on your Mobile Device should be transferred to your office's recordkeeping system on a regular basis. This may be done automatically or manually. A recordkeeping system may be either electronic or hard-copy, as long as records are organized and accessible. ...
Is the information on my Mobile Device subject to FOIA, subpoena, and discovery?
Yes, information on your Mobile Device may be requested under FOIA or in response to litigation. The same exemptions apply to the release of the information that apply to all other EPA records.
My Mobile Device was not provided by the Agency. Do these rules still apply to me?
Yes, if you have Agency records on a personally-owned Mobile Device, they still need to be captured in an approved recordkeeping system." (emphases in original) Frequent Questions about Mobile and Portable Devices, and Records, http://www.epa.gov/records/faqs/pda.htm.
A sufficient search of the device(s) and account(s) is one conducted by someone other than the parties or, at minimum, supervised. A "no records" response would require an affidavit authenticating the search and the parties declaring that they did not use real-time messaging for work-related correspondence at any time during the periods at issue in this request.

management practices and procedures. We have suggested they place focus on electronic records including email and instant messaging. While we have made progress in these areas, we are committed to addressing any concerns or weaknesses that are identified in this audit . . . to strengthen our records management system").[5]

All employees covered by this requests had a duty under the Federal Records Act not to destroy text messages, and to take remedial action once such destruction occurred.[6]

We are interested in EPA's compliance with its legal obligation to maintain and preserve text messages sent or received on Agency devices, provided for the performance of Agency duties, as federal records and Agency records. For reasons already stated, work-related or possibly work-related text message correspondence, like email and the other alternative to email EPA provides its employees, instant messages, are unquestionably records; there is at present no information indicating these are managed by EPA as federal records and/or as "records" under FOIA. Indeed, it is our understanding including by information, and belief, that EPA is not producing text message transcripts or discussions in response to FOIA or congressional oversight requests for "records" or "electronic records".

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[5] *See also* April 11, 2008 memorandum from John B. Ellis, EPA, to Paul Wester, National Archives and Records Administration, at 4 (reporting discovery of record-keeping problems) available at http://epw.senate.gov/public/_files/2008_EPA_Archives_Memo_HILITED.pdf; *see also Records and ECMS Briefing, EPA Incoming Political Appointees 2009,* http:// www.epw.senate.gov/public/ index.cfm? FuseAction=Files.View&FileStore_id=60afa4b3-3e5d-4e6f-b81e-64998f0d3c67.

[6] 44 U.S.C. § 3106.

Regardless, EPA must maintain EPA-related correspondence (and EPA provides staff PDAs and several real-time options precisely for work-related correspondence). Officials are not permitted to simply destroy or fail to preserve records or a class of records, regardless of what medium of communication it applies to. "While the agency undoubtedly does have some discretion to decide if a particular document satisfies the statutory definition of a record," the Federal Records Act does not "allow the agency by fiat to declare 'inappropriate for preservation' an entire set of" electronic or "email documents" generated by officials.[7]

Further, we possess emails referencing, as understood, past discussions by real-time messaging. The periods of time covered by this request are relevant to two matters in particular.

[7] *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1283 (D.C. Cir. 1993).

EPA Owes Requesters a Reasonable Search, Which Includes a Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

For these reasons requesters expect this search be conducted free from conflict of interest.

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies.

If EPA claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people,**

then it should not be disclosed. That era is now over, starting today" (President Barack Obama, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

It is difficult to see how the requested records, sent or received on a device or real-time message system provided by EPA, exclusively for the performance of Agency duties, with extremely limited circumstantial exceptions permitted, could be deemed "private"; that is, that their release would constitute an unwarranted invasion of personal privacy. For the same reasons of context it is further difficult to see how this could entail substantial review time. Regardless, we seek work-related correspondence.

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity "to permit a

reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F. 2d 210, 223-24 (D.C. Cir. 1987).

We remind EPA it cannot withhold entire documents rather than produce their "factual content" and redact the confidential advice and opinions. As the D.C. Circuit Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

This discussion through page 27 is detailed as a result of our recent experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[8] It **is only relevant if EPA considers denying our fee waiver request**.

[8] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

A. Pursuant to the Public Interest, 5 U.S.C. § 522(a)(4)(A)(iii)

1. Subject of the Request

Potentially responsive records will inform the public about certain EPA activities relating to the controversial practice of "mountaintop removal mining" and EPA's efforts to end the practice, led by the individuals some of whose work-related IMs this request seeks. The subject of this request has become the subject of substantial media interest, as well as congressional requests for explanation and information. As previously discussed, the information sought will provide important insights into the described public policy-related issues. The requested records thus clearly concern the operations and activities of government.

We emphasize that a requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C.Cir. 2003).

2. Informative value of the information

FOIA requesters and other individuals and organizations concerned with good government and otherwise concerned with wise use of taxpayer money, and sound environmental and energy policy, have a clear interest in this topic. Congressional interest in the MTM regulatory infrastructure is further demonstration of a significant public interest in this

information. Based on records already obtained we believe that this information will allow for a first-hand, unfiltered look at certain key discussions. EPA's copies are public records. The public has no other means to secure this information other than through the Freedom of Information Act. This makes the information sought highly likely to significantly contribute to an understanding of government operations and activities.

3. Contribution to an understanding by the general public.

Requesters have a record of obtaining and producing information as would a news media outlet and as a legal/policy organization that broadly disseminates information on important energy and environmental policy related issues, including how various agencies related to energy and environmental policies conduct themselves related to transparency efforts from outside organizations such as E&E Legal and FMELC. In addition to being functionally a news outlet, both requesters have disseminated their work in a manner that results in coverage by national news outlets on television, in national newspapers, and in policy newsletters from state and

national policy institutes.[9] Requesters have a recognized interest in and reputation for leading relevant policy debates and expertise in the subject of energy and environment-related regulatory

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[9] Print examples, only, to the exclusion of dozens of national electronic media broadcasts, include, *e.g.*, Dawn Reeves, EPA Emails Reveal Push To End State Air Group's Contract Over Conflict, INSIDE EPA, Aug. 14, 2013; Editorial, Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests, WASHINGTON EXAMINER, Jan. 28, 2013; Michal Conger, Emails show green group influence on EPA coal rule, WASHINGTON EXAMINER, Jan. 9, 2014; C.J. Ciaramella, Sierra Club Pressed EPA to Create Impossible Coal Standards, WASHINGTON FREE BEACON, Jan. 10, 2014; C.J. Ciaramella, Emails Show Extensive Collaboration Between EPA, Environmentalist Orgs, WASHINGTON FREE BEACON, Jan. 15, 2014; Stephanie Paige Ogburn, Climate scientists, facing skeptics' demands for personal [sic] emails, learn how to cope, E&E NEWS, Jan. 21, 2014; Anthony Watts, New FOIA emails show EPA in cahoots with enviro groups, giving them special access, WATTS UP WITH THAT, Jan. 15, 2014; Stephen Dinan, Obama energy nominee Ron Binz faces rocky confirmation hearing, WASHINGTON TIMES, Sept. 17, 2013; Stephen Dinan, Top Obama energy nominee Ron Binz asked oil company employees for confirmation help, WASHINGTON TIMES, Sept. 17, 2013; Vitter, Issa Investigate EPA's Transparency Problem, More Suspicious E-mail Accounts, WATTS UP WITH THAT, Jan. 29, 2013 ("It should also be noted that this has come to light thanks to the work of Chris Horner and ATI, who forced production of these documents by EPA in their FOI litigation."); Stephen Dinan, Obama energy nominee in danger of defeat, WASHINGTON TIMES, Sept. 18, 2013; Stephen Dinan, Greens, lobbyists and partisans helping Ron Binz, Obama's FERC pick, move through Senate, THE WASHINGTON TIMES, Sept. 12, 2013; Stephen Dinan, Energy nominee Ron Binz Loses voltage with contradictions, Obama coal rules, WASHINGTON TIMES, Sept. 22, 2013; Conn Carroll, FOIA reveals NASA's Hansen was a paid witness, WASHINGTON EXAMINER, Nov. 7, 2011; NASA Scientist accused of using celeb status among environmental groups to enrich himself, FOX NEWS, Jun. 22, 2011; Editorial, The EPA: A leftist agenda, PITTSBURGH TRIBUNE-REVIEW, Jan. 18, 2014; John Roberts, "Secret dealing"? Emails show cozy relationship between EPA, environmental groups, FOX NEWS, Jan. 22, 2014; Elana Schor, Proponents pounce on emails between EPA, enviros on pipeline, E&E NEWS, Jan. 23, 2014; Mike Bastasch, Analysis: Green Hypocrisy in Keystone XL pipeline opposition, DAILY CALLER, Feb. 6, 2014; Mark Tapscott, Emails expose close coordination between EPA, Sierra Club and other liberal environmental activist groups, WASHINGTON EXAMINER, Jan. 23, 2014; Editorial, EPA has ties to radical environmentalists, DETROIT NEWS, Feb. 13, 2014; Michael Bastasch, Report: EPA coal plant rule tainted by secretiveness, collusion with green groups, DAILY CALLER, Mar. 10, 2014; Jennifer G. Hickey, Legality of EPA Rules Questioned by Environmental Litigators, NEWSMAX, March 21, 2014; Michael Bastasch, Confidential document reveals the Sierra

policies, including how related agencies respond to transparency efforts, and they and their staffs' publications demonstrate requesters have the "specialized knowledge" and "ability and intention" to broadly disseminate the information requested in the broad manner, and to do so in a manner that significantly contributes to the understanding of the "public-at-large."

4. Significance to Public Understanding

Repeating by reference the above discussion, only by EPA releasing this information will public interest groups such as requesters, the media, and the public at large see these terms first hand and draw their own conclusions concerning the MTM issue and EPA staff driving its policy and further regulations.

B. Commercial Interest of Requesters

1. No Commercial Interest

Requesters are organized and recognized by the Internal Revenue Service as 501(c)(3) educational organizations. Requesters do not charge for copies of reports. The requested information is not sought for a commercial purpose and cannot result in any form of commercial gain to requesters, who have absolutely no commercial interest in the records.

2. Primary Interest in Disclosure

With no possible commercial interest in these records, an assessment of that non-existent interest is not required in any balancing test with the public's interest. Requesters also satisfy this factor as news media outlets.[10]

[10] See discussion beginning p. 17.

As such and also for the following reasons requesters seek waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge…if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester") (As we request documents in electronic format, there should be no copying costs).

As non-commercial requesters, requesters are entitled to liberal construction of the fee waiver standards. 5 U.S.C. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci,* 835 F. 2d 1284, 2184 (9th Cir. 1987). FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986)(fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp.867, 872 (D.Mass.

1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S.REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[11]

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, *citing* Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI.* Given this, "insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* at 94 (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*.

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[11] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like requesters, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain oft heir primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State* at 93. They therefore, like requesters, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for requesters. "This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens forResponsibility & Ethics in Washington v. U.S. Dep't of Educ*., 593 F. Supp. 261, 268 (D.D.C.2009), *citing to McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th.Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy). Requesters' ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State* 780 F.2d 86, 94 (D.C. Cir. 1986). As the Better Government court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities — publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These

investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports *public* oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; *or, otherwise confirms or clarifies data on past or present operations of the government*." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286. (*emphasis added)*. This information request meets that description, for reasons both obvious and specified. The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records, pertain to EPA's activities of great public and congressional interest, as previously described. They also directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration ever". This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency"). As such, requesters have stated "with reasonable specificity that its request pertains to "operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would

increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

C. In The Alternative, E&E Legal and FMELC Qualify as a Media Organization under 5 U.S.C. § 522(a)(4)(A)(ii)(II)

As authorized under FOIA, EPA must waive fees for representatives of the news media. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). In the alternative in the event EPA denies requesters' fee waiver under FOIA's public interest prong, E&E Legal and FMELC meets the criteria for a fee waiver as a representative of the news media; also, FMELC meets this test, as a "representative of the news media" is defined as any person actively gathering information about current events or of current interest to the public ("news") for an entity that is organized and operated to publish or broadcast news to the public. Office of Management and Budget Guidelines, 52 Fed. Reg. 10012, 10018 (March 27, 1987).

The White House Office of Management and Budget (OMB) published guidance on its interpretation of the term "representative of the news media." OMB includes in this category publishers of newsletters and similar periodicals, publishers of books, and radio and television broadcasting. However, "labels and titles alone do not govern; the organizations' substantive activities control." *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 21 (D.C.D.C. 2003).

Courts have affirmed that non-profit requesters like E&E Legal and FMELC who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011

U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also, Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012). The courts use a three prong test of an organization's activities. A representative of the news media is a person or entity that (1) gathers information of potential interest to a segment of the public; (2) uses its editorial skills to turn the raw materials into a distinct work; and (3) distributes that work to an audience. *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387, 279 U.S. App. D.C. 308 (D.C. Cir. 1989). This reflects OMB's regulatory preamble language indicating a representative of the news media must "perform an active rather than passive role in dissemination." OMB Guidelines, 52 Fed. Reg. at 10015. Requesters meet all three prongs.

1. E&E Legal and FMELC seek information of interest to a broad segment of the public.

E&E Legal and FMELC have taken a leadership role of late in assessing various agencies compliance with the President's commitment to transparency. Evidence that such information is of potential interest to a segment of the public is manifest in the use of this information by other publication entities, lawmakers and the public, a point we make explicit in this request. E&E Legal and FMELC has an established practice of using FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, has brought to light important information about policies grounded in energy and environmental policy, as well as how agencies react to transparency efforts.

2. E&E Legal and staff use their editorial skills to turn the raw materials into distinct work

Undersigned counsel/E&E Legal fellow Christopher Horner uses editorial skills to turn raw materials into distinct work published under his name, as found in the Washington Examiner, on Breitbart and on the premier electronic science daily publication WattsUpWithThat. E&E Legal's General Counsel David Schnare & Mr. Horner have each written and/or edited multiple books addressing environmental issues. Dr. Schnare has routinely contributed works to the Thomas Jefferson Institute for Public Policy's Jefferson Journal.[12] Thomas Tanton, E&E Senior Fellow, authored E&E Legal's report entitled "The Hidden Cost of Wind Energy." E&E Legal and FMELC staff not only has a lengthy history of turning raw materials into distinct works, and specifically news articles, they have done so as staff to E&E Legal and for E&E Legal publications, and as discussed above, and plan on doing so again, using, in part, the documents received under this request.

3. E&E Legal and FMELC distributes that work to an audience

The key to whether an organization merits "media" fee waiver is whether a group publishes, as E&E Legal most surely does. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

> The relevant legislative history is simple to state: because one of the purposes of FOIA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: "It is critical that the phrase representative of the news media' be broadly interpreted if the act is to work as expected.... In fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a `representative of the news media.'" Id. at 1385-86.

[12] *See* http://www.jeffersonpolicyjournal.com.

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the "plan to act, in essence, as a publisher, both in print and other media." *EPIC v. DOD*, 241 F.Supp.2d at 10 (emphases added). "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

Specifically, E&E Legal is a publisher of books and reports that address matters associated with energy, the environment and federal bureaucratic pathologies.[13] E&E Legal published Greg Walcher's "Smoking Them Out – The Theft of the Environment and How to Take it Back." It published seven reports on the true cost of renewable portfolio standards.[14] FMELC and E&E Legal co-published Dr. Schnare's legal treatise "Protecting Federalism and State Sovereignty through Anti-Commandeering Litigation." In addition, E&E Legal publishes a quarterly newsletter entitled E&E Legal Letters in which General Counsel David Schnare, Senior Legal Fellow Horner (Also undersigned counsel on behalf of FME Law), staff attorneys and

[13] Requesters point to their website for examples of its reports and publications. See http://eelegal.org/?page_id=2070.

[14] *See* True Cost of Renewable Portfolio Standards, http://eelegal.org/?page_id=1734.

guest experts author an informative and educational article on an aspect of the law that emerges as part of E&E Legal's activities, including its transparency initiative.[15]

E&E Legal publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.[16] FMELC publishes scholarly works and contributes to non-scholarly media as experts on bureaucratic governmental practices.[17] Those activities are in fulfillment of E&E Legal and FMELC's purposes and missions. We intend to disseminate the information gathered by this request to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) E&E Legal and FMELC's websites; (d) in-house publications for public dissemination; (e) scholarly articles prepared for publication in peer- reviewed law journals (f) other electronic journals, including blogs to which our professionals contribute; (g) local and syndicated radio programs dedicated to discussing public policy; (h) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the

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[15] See http://eelegal.org/?page_id=1798.

[16] *See EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

[17] *See e.g.,* FME Law Director participation on a panel dealing with use of FOIA with respect to scientific endeavors, most particularly the instant requesters', sponsored by the National Academy of Sciences and George Washington University (April 1, 2014, Washington D.C.), relevant findings of which scholarly research E&E Legal intends to continue publishing in its publications.

public record on deliberations of the legislative branches of the federal and state governments on the relevant issues. E&E Legal and FMELC staffs also intend to disseminate the information gathered by this request via media appearances.

E&E Legal, with FMELC's assistance, has produced two extensive reports, one on collusion between EPA and environmentalist pressure groups in its "war on coal", and another on what our and similar groups' use of FOIA has revealed about EPA operations and activities, more broadly. E&E Legal has conducted several studies on the operation of government, government ethics and the degree to which EPA follows its own rules and laws controlling its administrative activities.

E&E Legal's publication of books, reports and newsletters far surpasses the publishing plan that was, standing alone, sufficient in *National Security Archive, v. Dep't of Defense*, 880 F. 2d at1386 (tax-exempt corporations achieve news media status through publication activities, including being a publisher of periodicals such as the E&E Legal Letter). *See also, Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d at 21-22 & 24-25 (tax-exempt corporations achieve news media status through publication activities, including being a publisher of periodicals such as the E&E Legal Letter); and *Id*. at 27 ("The fact that EPIC's newsletter is disseminated via the Internet to subscribers' e-mail addresses does not change the analysis."); and see, *Media Access Project v. FCC,* 883 F.2d 1063, 1070 (D.C. Cir. 1989) ("In the case sub judice, the Commission virtually concedes that petitioners [People for the American Way] and [Union of Concerned Scientists] would qualify for preferred status as representatives of the news media" due to their "regular publication of a newsletter or periodical.").

In addition to print publications, undersigned counsel Horner appears regularly, to discuss his work on matters of energy and environmental policy, on national television and national and local radio shows.

We conclude by noting, "In short, the court of appeals in National Security Archive held that '[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.'" *EPIC*, 241 F.Supp. at 11.[18] As already discussed with extensive supporting precedent, government information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, requester E&E Legal and FMELC qualify as "representatives of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F.Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA,

[18] *See also*, *Forest Guardians v. U.S. Dept. of Interior,* 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

including after the 2005 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice,* No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012). Because E&E Legal meet each prong of the *Nat'l Sec. Archive* test, it qualifies as a representative of the news media and a fee waiver on that basis.

D. In the Alternative, FMELC Qualifies as an Educational Institution under 5 U.S.C. § 522(a)(4)(ii)(II)

In similar measure, FMELC qualifies as an educational institution. Under OMB guidance, an institution of professional education or an institution of vocational education, which operate a program or programs of scholarly research qualifies for a few waiver under FOIA.[19]

FMELC provides education to law students, its Director is an Adjunct Professor of Law at George Mason University School of Law, it provides continuing legal education to attorneys in Virginia (a vocational education function) and it conducts a program of research on bureaucratic pathologies and Constitutional restraints to federal government overreach. These facts reflect the exact formulation for qualification for fee waiver under 5 U.S.C. §552(a)(4)(A)(ii)(II), as explained by the White House Office of Management and Budget. Accordingly, any fees charged under this categorization must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

[19] See 52 Fed. Reg. 10014 (March 27, 1987).

EPA must address this alternate basis for fee waiver in the event it denies fee waiver on the basis of the public interest. Failure to do is prima facie arbitrary and capricious.

CONCLUSION

We expect the Department to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias,and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009)("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

FOIA specifically requires EPA to immediately notify requesters with a particularized and substantive determination, and of its determination and its reasoning, as well as requesters' right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See,CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013). *See also; Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing"the statutory

requirement that [agencies] provide estimated dates of completion"). We request a rolling production of records, should it be necessary, such that the agency furnishes records to undersigned counsel's attention as soon as they are identified, preferably electronically,[20] but as necessary in hard copy to his attention. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, e.g., *CREW v. FEC*. If you have any questions please do not hesitate to contact undersigned.

Respectfully submitted,

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[20] For any mailing that EPA finds necessary, we request you use 1489 Kinross Lane, Keswick, Virginia, 22947 Attn. Chris Horner.